Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98

To: The Commission

REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby replies to comments filed in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

In its initial comments, NCTA demonstrated that Congress intended a broad right of access to poles, ducts, conduits, and rights-of-way (collectively hereinafter, "poles") under Section 224(f)(1). The Commission has clear authority under the Telecommunications Act of 1996 ("1996 Act") to adopt rules to implement the right of access; failure to do so would compromise the development of a competitive telecommunications marketplace, in contravention of the express purposes of the 1996 Act.

Without any basis in law or policy, the utility commenters argue for the ability to warehouse pole space for their own future use, including for the provision of telecommunications services in competition with cable operators and other competitive local exchange carriers ("CLECs"). The Commission must reject these attempts by the utilities to assert monopoly control over poles, and place a heavy burden on utilities seeking to deny access. Insufficient

pole space can always be remedied by rearranging lines, replacing a pole, or subdividing inner ducts. Cable companies and other CLECs should not be required to bear the costs of unnecessary pole modifications or modifications designed solely to benefit pole owners, however.

Most commenters support the Commission's tentative conclusion that the transfer of numbering issues to a neutral administrator pursuant to the NANP Order will generally satisfy the requirements of the 1996 Act. The comments also support NCTA's request for the Commission to preclude overlay area codes until there is full number portability, including portability of area codes. Any other course of action would disproportionately disadvantage new entrants.

I. NONDISCRIMINATORY ACCESS TO POLES IS ESSENTIAL

The 1996 Act recognizes that cable operators and CLECs are dependent upon access to poles, over which utilities, including local exchange carriers ("LECs"), hold a monopoly. Accordingly, Congress amended Section 224 of the Act by making access to these facilities mandatory[1/] and by providing in Section 251 that LECs must comply with the requirements of Section 224.[2/]

The Commission clearly has authority to adopt national rules to govern access to all utilities' poles and conduits. Section 251(d) requires the Commission to "establish regulations

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1/ 47 U.S.C. § 224(f)(1).

2/ Id., § 251(b)(4).

to implement the requirements of [Section 251],"[3] which indisputably includes Section 251(b)(4), "Access To Rights-Of-Way."[4] Contrary to the argument of the Rural Telephone Coalition ("RTC"),[5] moreover, Congress explicitly provided in Section 224 that "[t]he Commission shall prescribe by rule regulations to carry out the provisions of this section."[6] Although the Commission is precluded from exercising its jurisdiction over pole attachments in cases where such matters are regulated by a state (subject to the state's satisfaction of certification and other requirements), this does not mean that utilities are freed from their obligation to provide nondiscriminatory access pursuant to Section 224(f).[7]

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[3] Id. § 251(d).

[4] Id. § 251(b)(4).

[5] RTC incorrectly asserts that Congress was silent with regard to the Commission's rulemaking authority on anything other than "pole attachment charges." Rural Telephone Coalition Separate Comments at 10-11 ("RTC Separate Comments").

[6] 47 U.S.C. § 224(b)(2).

[7] Indeed, Section 224(c)(1)'s removal of jurisdiction from the Commission "with respect to rates, terms, conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f)" can properly be interpreted to mean that the state taking the position of the Commission must ensure that the access requirements of subsection (f) are satisfied. Id. § 224(c)(1) (emphasis added).

A. There are Few Valid Justifications for Denial of Access to Poles

Despite the clear mandates of interrelated Sections 224 and 251(b)(4), and the long history of pole access discrimination by utilities,[8/] a number of incumbent local exchange carriers ("ILECs") and electric utilities argue that there is no reason for the Commission to adopt implementing rules. At the same time, however, they forecast their intention to discriminate against new entrants by contending that pole owners should be permitted to deny access in order to reserve space for their own future use and internal communications facilities.[9/] The Public Service Company of New Mexico ("PNM") further suggests that refusal of access requests should be permitted to avoid "unnecessary duplication of facilities," and that carriers should be required to enter into resale or joint-use agreements to "retain some capacity for future, advanced telecommunications technologies."[10/] At the same time, PNM argues that utilities

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[8/] See Joint Comments of Continental Cablevision, Inc.; Jones Intercable, Inc.; Century Communications Corp.; Charter Communications Group; Prime Cable; Intermedia Partners; TCA Cable TV, Inc.; Greater Media, Inc.; Cable TV Association of Georgia; Cable Television Association of Maryland, Delaware, and the District of Columbia, Inc.; Montana Cable TV Association; Texas Cable and Telecommunications Association at 1-2 ("Joint Cable Comments" or "Joint Cable Commenters") ("The monopoly abuse of these essential facilities has been catalogued by the U.S. Congress, federal district and circuit courts, the FCC, the Department of Justice, and the U.S. Supreme Court.").

[9/] See, e.g., Ameritech Separate Comments at 36; BellSouth Separate Comments at 15; Cincinnati Bell Telephone Company Separate Comments at 7 ("Cincinnati Bell Separate Comments"); Duquesne Light Company Separate Comments at 16; Public Service Company of New Mexico Separate Comments at 11; Telecommunications Association (UTC) and Edison Electric Institute Joint Separate Comments at 6, 9-10 ("UTC and EEI Joint Separate Comments").

[10/] Public Service Company of New Mexico Separate Comments at 20.

must be able to reserve capacity for themselves.[11/] According to these utility commenters, the parties requesting access should bear the burden of proving that a denial is improper.[12/]

These proposals to restrict access plainly violate the 1996 Act. Indeed, PNM's desire to "husband" capacity for future use by according to itself the power to determine when "enough" facilities have been constructed in a particular market flies directly in the face of Congress's objective of promoting facilities-based competition.[13/] While the Act adopted a narrow provision that allows electric utilities to deny access where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes,[14/] it does not permit poles to be removed from joint use "merely because the utility would prefer that only its own fiber be attached."[15/] Moreover, insufficient pole capacity can always be remedied by rearranging lines or replacing the pole with a taller one,[16/] and conduit congestion can be

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11/ Id. at 16-17.

12/ See, e.g., Kansas City power and Light Company Separate Comments at 4; UTC and EEI Joint Separate Comments at 11; Puget Sound Power and Light Company Separate Comments at 5.

13/ National Cable Television Association, Inc. Comments at 26 ("NCTA Comments")("Congress expressed a strong and clear preference for facilities-based competition in the 1996 Act that is reflected in specific provisions of the legislation.").

14/ 47 U.S.C. § 224(f)(2)

15/ Joint Cable Comments at 16.

16/ The upfront expenses associated with these activities, which are generally borne by requesting parties, are called "makeready." Id. at 11-12.

relieved by subdividing inner ducts.[17] Similarly, issues of safety and reliability can be cured by compliance with the National Electric Safety Code ("NESC").[18] Thus, the instances where electric utilities can justify their reluctance to share poles and conduits by referral to the Section 224(f)(2) exceptions will be very rare.

As the Joint Cable Commenters explain, under general practice today, cable companies attach their cables to poles with adequate space after paying the engineering costs incurred by the utilities for inspection and, if necessary, rearrangement of existing lines. If a larger pole is required, it is replaced at the cable company's expense with one five feet higher.[19] In addition, conduits and ducts owned by telephone companies are routinely subject to joint use and each duct within a conduit can be subdivided through the use of inner duct. This method is commonly used in new construction and to relieve congestion in downtown business districts.[20] Any utility claiming insufficient capacity on poles or in conduits, therefore, should be required to demonstrate the factual basis for its denial.

The Joint Cable Commenters and Time Warner also argue persuasively that attempts by utilities to require adherence to "safety and reliability" standards greater than the NESC should

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[17] Id. at 16-17. The Commission should disregard Cincinnati Bell's suggestion that access to conduits should not be evaluated under the same criteria as access to poles. Cincinnati Bell Separate Comments at 9. Section 224(f) explicitly provides that utilities shall provide access to "any pole, duct, conduit or right-of-way," 47 U.S.C. § 224(f), and, as explained below, expansion of conduits to accommodate multiple providers is usually possible.

[18] Joint Cable Comments at 16.

[19] Id. at 11. See also Time Warner Separate Comments at 14.

[20] Joint Cable Comments at 16-17.

be presumed unreasonable.[21] Proposed revisions to the NESC "are subjected to extensive peer review, published in advance after committee evaluation, and then applied only on a prospective basis, with current facilities grandfathered to prior codes."[22] Given the existence of this objective source, there is no reason the Commission or a service provider should be placed in the position of determining whether a utility's self-generated, internal requirements are reasonable.

In those rare instances where capacity might be a problem, NCTA agrees with Time Warner that first-come, first-served procedures are appropriate. To prevent warehousing, entities holding rights to capacity, including the pole owner and its affiliates, should be required to make an attachment within a reasonable period of time.[23]

B. Cable Companies and CLECs should not Bear the Costs of Unnecessary Modifications or Modifications Designed Solely to Benefit Pole Owners

While Duquesne Light Company acknowledges that Section 224(h) does not require an entity with an existing attachment to bear any makeready costs if it does not elect to add to or modify its attachment, other utilities currently are attempting to skirt Congress's desire to promote access without the imposition of unnecessary makeready costs. For example, Duke Power recently announced that, henceforth, any operator seeking access to its poles would have to install a taller pole, regardless of current pole capacity.[24] As the Joint Cable Commenters

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[21] Id. at 17-18; Time Warner Separate Comments at 14-15.

[22] Joint Cable Comments at 18.

[23] Cf. Duquesne Light Company Separate Comments at 19. Duquesne proposes that the anti-warehousing requirement apply only to "carriers holding leased capacity." Id. This limitation clearly would be discriminatory.

[24] Joint Cable Comments at 9.

demonstrate, this practice, if permitted, would dramatically change the economics of joint use by raising makeready costs from approximately $2000/mile to $35,000/mile.[25/] It would also allow the utility to escape its obligation to replace older and non-complying poles at the same time that it continues to collect attachment charges from the company that paid for the replacement.[26/] Duke Power's strategy clearly constitutes a violation of the spirit, if not the letter, of Section 224(f), which mandates nondiscriminatory access to poles.

Similarly, the requirement that pole owners give written notification of modifications or alterations so that an attaching entity "may have a reasonable opportunity to add to or modify its existing attachment" may not be used as a excuse to require payment from parties that would be satisfied with the status quo. Even if the attaching entity benefits inadvertently from the owner's modification, it need not share in the financial burden.[27/]

Contrary to the suggestions of various utilities, the requirement that attaching entities bear a "proportionate share of the costs incurred by the owner" does not mean that utilities may impose "equal" costs on all entities that choose to make modifications in response to the notification.[28/] NCTA agrees with Time Warner that determinations of "proportionate share"

[25/] Id. at 12.

[26/] Id.

[27/] Only those parties choosing to add to or modify their existing attachments after receiving notification are required to "bear a proportionate share of the costs incurred by the owner." 47 U.S.C. § 224(h).

[28/] See, e.g., Duquesne Light Company Separate Comments at 26; UTC and EEI Joint Separate Comments at 16; The Ohio Edison Company Separate Comments at 26-27; American Electric Power Service Corporation, Baltimore Gas and Electric Company, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power & Light Company, Metropolitan Edison/Pennsylvania Electric Company, Montana Power Company, (continued...)

can be accomplished by application of a simple "but for" test.[29/] If the attaching entity's alteration does not add to the costs incurred by the owner for its own modification, the attaching entity should pay no portion of the costs.[30/]

Finally, NCTA takes issue with the various utilities that suggest that five or ten days notice is sufficient to satisfy Section 224(h)'s mandate. The Joint Cable Commenters point out that pole attachment contracts today generally require 30-90 days advance notice of transfer and makeready charges.[31/] Because this practice will provide for coordinated planning of construction, at least 90 days' notice should be provided.

II. THE COMMISSION'S NUMBERING AND DIALING PARITY RULES SHOULD PROMOTE COMPETITION ON A LEVEL PLAYING FIELD

Most of the commenters support the Commission's tentative conclusion that the transfer of numbering issues to a neutral administrator pursuant to the NANP Order[32/] will generally satisfy the requirements of the 1996 Act. As Teleport points out, however, the changes

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28/ (...continued)
Northern States Power Company, Otter Tail Power Company, Pacific Gas & Electric Company, The Southern Company, tampa Electric Company, The Southern Company, Tampa Electric Company, Union Electric Company, Washington Water Power Company, Wisconsin Electric Power Company, and Wiscon Public Service Corporation, Joint Separate Comments at 56.

29/ Time Warner Separate Comments at 7.

30/ Id.

31/ Joint Cable Comments at 20.

32/ In the Matter Of Administration of The North American Numbering Plan, Report and Order, CC Docket No. 92-237, FCC 95-283 (rel. July 13, 1995)(recon. pending).

contemplated by the NANP Order have yet to be implemented.[33/] Today, NXXs are still assigned by the dominant ILECs in each state, which, according to Teleport, has resulted in difficulties obtaining numbers on an equitable basis.[34/]

Accordingly, the Commission should immediately follow through on its decision to set up the North American Numbering Council ("NANC"). Until the NANC is fully established, the Commission should exercise plenary jurisdiction over numbering administration. ILECs have a significant incentive to discriminate against their ever-increasing competitors, and allowing them to retain control over central office code assignments during this period will provide them with an obvious vehicle to do so.

With regard to area code issues, NCTA reiterates its request that the Commission preclude states from using geographic overlays to provide area code relief, at least until there is full number portability, including the portability of area codes.[35/] Because overlays disproportionately impact new entrants, their use is inconsistent with Section 251(e), which requires that numbers be administered on an equitable basis.

[33/] Teleport Communications Group Inc. Separate Comments at 3 ("Teleport Separate Comments").

[34/] Id.

[35/] National Cable Television Association, Inc. Separate Comments at 9-10 ("NCTA Separate Comments); see also Comments of the National Television Association, Inc., In the Matter of Telephone Number Portability RM 8535, Notice of Proposed Rulemaking, CC Docket 95-116 (filed Mar. 29, 1996) (calling on Commission to adopt, within the 6-month period specified by the 1996 Act, number portability rules that require deployment of full number portability by no later than January 1, 1998). Notably, under interim portability techniques, area code portability is not technically feasible.

Absent full number portability, area code overlays may prevent LECs from fulfilling their duty under Section 251(b)(3) to provide dialing parity to competing providers.[36/] After implementation of an overlay, new entrants will be assigned NXX codes from the new area code only, while most ILEC customers will continue to use their telephone numbers in the original area code. Therefore, calls placed between ILEC and CLEC customers in the overlay area will generally be between different area codes. Unless the state requires ten-digit dialing for all local calls, including those between the same area code, the result would constitute a denial of dialing parity.[37/]

III. NOTICE OF TECHNICAL CHANGES SHOULD GIVE NEW ENTRANTS SUFFICIENT TIME AND INFORMATION TO RESPOND

As NCTA explained in its initial comments, public notice of technical changes is necessary to avoid interruptions in service and unnecessary expense.[38/] NCTA agrees with the Commission's tentative conclusion and the proposals of various commenters that existing industry organizations, such as Network Operations Forum ("NOF") and Interconnection Carrier Compatibility Forum ("ICCF"), are appropriate vehicles for disseminating such information.[39/] In addition, NCTA urges the Commission to adopt Communications Company, Inc.'s suggestion

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[36/] See NCTA Separate Comments at 9-10; see also MFS Communications Company, Inc. Separate Comments at 4 ("MFS Separate Comments"); Cox Communications, Inc. Separate Comments at 3-6; see also Teleport Separate Comments at 4-7.

[37/] See MFS Separate Comments at 4-5.

[38/] NCTA Separate Comments at 12.

[39/] See, e.g., SBC Communications, Inc. Separate Comments at 14; NYNEX Separate Comments at 15-17; Teleport Separate Comments at 11; United States Telephone Association Separate Comments at 12.

that ILECs be required to give 18 months' notice of "major changes,"[40] 12 months' notice of "location changes,"[41] and follow industry-agreed standards for "minor changes."[42]

The Commission also should establish rules that prohibit discriminatory disclosure of information to affiliated or preferred ILEC customers. As Time Warner suggests, provision of notice about network changes to some competitors in advance of others would undermine Congress's efforts to encourage new entrants.[43] To avoid this problem, the Commission should ensure that ILECs provide the same information to all carriers at the same time.

Finally, the Commission should reject RTC's proposal to make the notice requirement reciprocal.[44] Congress deliberately chose to impose this obligation on ILECs only[45] and, contrary to RTC's assertion, ILECs are entirely capable of providing adequate notice of their network changes without "full disclosure of interconnectors' operations and future plans."[46]

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[40] "'Major changes' would be those introducing any change in network equipment, facilities, specifications, protocols, or interfaces that will require other parties to make any modification to hardware or software in order to maintain interoperability with the ILEC network." MFS Separate Comments at 15.

[41] "'Location changes' would be those that require changes in the geographic location to which traffic is routed, or at which access to unbundled network elements can be obtained, but do not otherwise change the manner of interconnection or of access." Id.

[42] "'Minor changes' would be changes in numbering, routing instructions, signaling codes or other information required for the exchange of traffic that do not require construction of new facilities or changes in hardware or software." Id. at 15-16.

[43] Time Warner Separate Comments at 9.

[44] RTC Separate Comments at 2, n.4.

[45] See 47 U.S.C. § 251(c)(5)(each ILEC "has the duty to provide reasonable public notice of changes").

[46] RTC Separate Comments at 2.

Moreover, as NCTA discussed in its general comments in this proceeding regarding the good faith negotiation standard, efforts by ILECs to obtain a new entrant's business forecasts in order to provide interconnection and unbundled elements would frustrate the very competition goals that the statute is intended to foster.[47/] Requiring provision of this information -- ostensibly for purposes of providing notice of ILEC technical alterations -- is equally harmful to Congress's objectives.

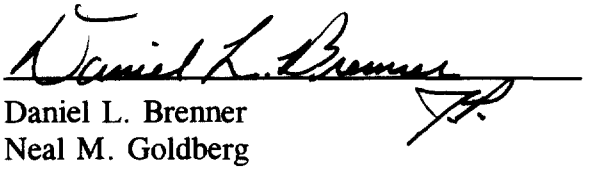
47/ NCTA Comments at 61-62.

CONCLUSION

For the foregoing reasons, and as described more fully herein, the Commission should adopt pole access, dialing parity, numbering administration, and public notice rules that promote the 1996 Act's objective of encouraging entry by new facilities-based competitors.

Respectfully Submitted,

THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.



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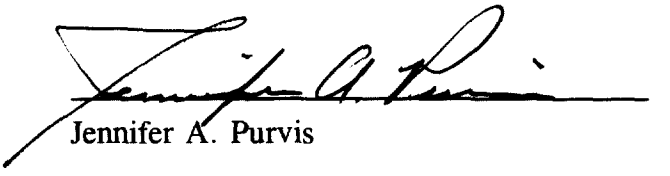
CERTIFICATE OF SERVICE

I, Jennifer A. Purvis, do hereby certify that on this 3rd day of June, 1996, a copy of the foregoing Reply Comments of The National Cable Television Association, Inc. was hand-delivered to the following:



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